INSTITUT INTEGRITI MALAYSIA v. ROZIAH HARUN & ANOR

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: W-01(A)-172-04-2023]
30 JULY 2024

Abstract – *(i) The Industrial Court lacks jurisdiction to hear and determine cases involving employees of Government agencies. A Government agency, as defined by relevant statutory provisions, is an entity established or controlled by the Government, performing public roles and functions and subject to Governmental oversight; (ii) A jurisdictional objection under s. 52 of the Industrial Relations Act 1967, which can be raised through an application under s. 29(fa) of the same Act, is a procedural matter, and the choice of procedure depends on the circumstances of the case.*

INDUSTRIAL COURT: *Jurisdiction – Jurisdictional objection – Institute incorporated under Companies Act 1965 – Claimant dismissed from employment at Institute due to allegations of serious misconduct – Director General of Industrial Relations ('DGIR') referred claimant's representation to Industrial Court – Whether Industrial Court had jurisdiction to hear and determine matter – Whether Institute a Government agency and within ambit of s. 52 of Industrial Relations Act 1967 ('IRA) – Whether jurisdictional objection based on s. 52 may be taken up by way of application to Industrial Court under s. 29(fa) of IRA – Whether Institute ought to have filed judicial review to quash decision of DGIR to refer claimant's representation to Industrial Court*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Institute incorporated under Companies Act 1965 – Claimant dismissed from employment at Institute due to allegations of serious misconduct – Director General of Industrial Relations referred claimant's representation to Industrial Court – Industrial Court struck out case due to lack of jurisdiction – Award of Industrial Court quashed by High Court – Whether Industrial Court had jurisdiction to hear and determine matter – Whether Institute a Government agency and within ambit of s. 52 of Industrial Relations Act 1967*

STATUTORY INTERPRETATION: *Definition – 'Government agency' – Claimant dismissed from employment at Institute due to allegations of serious misconduct – Director General of Industrial Relations referred claimant's representation to Industrial Court – Industrial Court struck out case as Institute a Government agency – Whether Institute a Government agency according to relevant statutory interpretations*

The appellant, Institut Integriti Malaysia ('Institute') was a company incorporated under the Companies Act 1965. The first respondent ('claimant') served with the Institute as Penolong Pengarah Kanan ('Projek Khas') before she was dismissed from employment due to allegations of serious misconduct. The Director General ('DG') of Industrial Relations referred the claimant's representation to the Industrial Court. The Institute relied on s. 52 of the Industrial Relations Act 1967 ('Act') and filed an application pursuant to s. 29(fa) and (g) of the Act seeking the case to be struck out ('s. 52 application'). The Institute's grounds for the s. 52 application were that: (i) the Institute was a Government agency and part of the National Centre for Governance, Integrity and Anti-Corruption ('GIACC') which was a department in the Prime Minister's Office ('PMO'); (ii) the operational funding including the salary of employees of the Institute was provided and allocated by the Federal Government *via* the PMO; (iii) the Industrial Court lacked the jurisdiction to hear and determine the case; and (iv) the Institute was not within the jurisdiction of the Act. The Industrial Court allowed the s. 52 application and struck out the claimant's case ('award'). Upon an application by the claimant for judicial review, the High Court quashed the said award and granted an order of *mandamus* for the case to be remitted to the Industrial Court for it to be heard on merits. Hence, the present appeal. The issues that arose were: (i) whether a jurisdictional objection based on s. 52 of the Act may be taken up by way of an application to the Industrial Court under s. 29(fa) of the Act or whether, as per the Supreme Court's decision in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd*, the Institute ought to have filed a judicial review to quash the decision of the DG of Industrial Relations to refer the claimant's representation to the Industrial Court; and (ii) whether the Institute was a Government agency and therefore, within the ambit of s. 52 of the Act.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) It would be an error to read into s. 29(fa) of the Act, words which do not appear in that section and to construe the section restrictively or at any rate, in such a way as to preclude a party from applying to strike out a case based on, *inter alia*, s. 52 of the Act. Parliament had left open the circumstances or the occasions on which the Industrial Court may exercise its power under s. 29(fa) of the Act to strike out a case. As such, in the circumstances of the present case, it was wholly appropriate for the Institute to have applied under s. 29(fa) of the Act. Depending on the facts and circumstances, where the evidence is clear and the issue can be dealt with summarily, it is open for a party to take the route *via* s. 29 of the Act to have the case struck out based on a jurisdictional objection under s. 52 of the Act. It was not necessary for the jurisdictional objection under s. 52 of the Act to be taken up at a full hearing. This would all depend on the facts and circumstances. To say

that every case where s. 52 of the Act is being invoked must proceed to a full hearing would render s. 29(fa) of the Act totally redundant and otiose. (paras 14, 17 & 21)

(2) The imperative question was whether s. 52 of the Act applied to the facts and circumstances of the present case and this turned on the singular question of whether the Institute was a Government agency. The Industrial Court agreed with the Institute and held that it was a Government agency. On the other hand, the High Court took the view that the word 'agency' used by the PMO per their letter dated 24 January 2007 'has no legal connotation'. It was incongruous for the High Court to say that the words 'Government agency' had no legal connotation when these words were in fact found in several legislations, *ie*, reg. 3 of the Service Tax Regulations 2018, s. 2 of the Statutory Bodies (Accounts and Annual Reports) Act 1980, s. 4 of the Statutory Bodies (Discipline And Surcharge) Act 2000, s. 18 of the Malaysian Aviation Commission Act 2015 and s. 84(13) of the Patents Act 1983. In light of the above statutory provisions touching upon the term Government agency or words to that effect, it was a misdirection for the High Court to have concluded or remarked that the word 'agency' which appeared in the PMO letter dated 24 January 2007 'has no legal connotation'. On the contrary, all indications are that the word Government agency was pregnant with legal meaning and connotation. (paras 23, 24 & 26-31)

(3) What constitutes a Government agency? In this regard, the Perak Housing and Real Property Board Enactment 2016, defines 'Government agency' as 'any ministry, department, office, agency, authority, commission, committee, board, council or other body, incorporated or unincorporated, of the Federal Government, State Government or local government, whether established under written law or otherwise'. Further, in the Preservation of Public Security (Sabah) Regulations 2013, Government agency is defined as '(a) Any Ministry, department, office, agency of the Federal Government or of any State Government or local Government; and (b) Any relevant authority, corporation or other body, corporate or unincorporated, of the Federal Government or of any State Government or local Government, whether established under written law or otherwise'. The meanings above were adopted as correctly defining or framing the meaning of "Government agency". (paras 32-34)

(4) The Institute was an integral part of the Government's national anti-corruption plan and all its objectives, functions and efforts were geared towards achieving the Government's desire to have a corruption-free public and private environment. It could also be seen from the documents and evidence and the circumstances here that the Institute was engaged in matters of high public interest and performing a public

function. The Institute was carrying out the functions entrusted to it and was not a free-standing commercial or private entity, but was, in pith and substance, an instrumentality or agency of the Government. The fact that the Institute generated income whilst achieving their mission and purposes did not make them a commercial or private entity and did not mean that they were not a Government agency. Further, the funding that was given by the PMO to the Institute came with clear guidelines and conditions that the relevant Government department/agencies must plan and prioritise the use of the monies from the PMO so as to achieve the stated goals and objectives. It was clear that the Institute did not have a 'free hand' to use the funds from the PMO in any manner as they should choose. Additionally, apart from having their own external auditors, the Institute was also subject to audit by the Auditor-General. (paras 39, 43 & 57)

(5) The High Court fell into error in disregarding the PMO letter dated 24 January 2007 and in glossing over all the evidence which were effectively building-blocks to establish that the Institute was a Government agency under the PMO. The court agreed with the Industrial Court that the Institute was a Government agency and that by virtue of s. 52 of the Act, the Industrial Court lacked the requisite jurisdiction to hear and determine the claimant's representation under s. 20(1) of the Act. The s. 52 application was validly made under s. 29(fa) of the Act. The order of the High Court was set aside. The award of the Industrial Court was reinstated and the case was struck out. (paras 58, 59 & 61)

Case(s) referred to:

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] CLJU 156; [1980] 1 LNS 156 FC ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***

Ng Boon Leh v. Malaysian-American Commission On Educational Exchange (MACEE) & Anor And Another Case [2022] 4 ILR 26 ***(refd)***

Ramana Dayaram Shetty v. International Airport Authority Of India And Others [1979] 2 SCC 489 ***(refd)***

Redberry Ambient Sdn Bhd v. Tribunal Rayuan Kastam & Anor [2024] 7 CLJ 66 CA ***(refd)***

Roziah Harun v. Institut Integriti Malaysia [2022] 1 ILR 461 ***(refd)***

Roziah Harun v. Institut Integriti Malaysia & Anor [2023] CLJU 2914; [2023] 1 LNS 2914 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (3), 29(fa), (g), 52(1)

Malaysian Aviation Commission Act 2015, s. 18

Patents Act 1983, s. 84(13)

Service Tax Regulations 2018, reg. 3, First Schedule, Group I, item 8

Statutory Bodies (Accounts and Annual Reports) Act 1980, ss. 2, 4

Statutory Bodies (Discipline And Surcharge) Act 2020, s. 4

For the appellant - Steven Thiru, Janice Leo & Adrienne Sena; M/s Prem & Assocs
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[Editor's note: For the High Court judgment, please see Roziah Harun v. Institut Integriti Malaysia & Anor [2023] CLJU 2914; [2023] 1 LNS 2914 (overruled).]

Reported by Lina E

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The main issue in this appeal is whether the appellant, Institut Integriti Malaysia ("the Institute"), could rely on s. 52 of the Industrial Relations Act 1967 ("the Act"), to contend that the Industrial Court of Malaysia did not have the requisite jurisdiction to hear and determine the representation that was made by the first respondent, Puan Roziah Harun ("the claimant"), under s. 20(1) of the Act that she had been dismissed by the Institute without just cause or excuse. The related issue is whether the Institute's contention as to the Industrial Court's lack of jurisdiction per s. 52 of the Act may be taken up by way of an application to the Industrial Court under s. 29(fa) of the Act, or whether the Institute ought to have applied by way of judicial review to quash the decision by the Director General of Industrial Relations (per s. 20(3) of the Act) to refer the claimant's representation under s. 20(1) of the Act to the Industrial Court for adjudication.

Brief Facts

[2] The claimant was, at all material times, an employee of the Institute. The Institute is a company incorporated under the Companies Act 1965 (now Companies Act 2016) as a company limited by guarantee. The claimant commenced employment with the Institute on 1 November 2007. The claimant is alleged to have committed serious misconduct. The Institute dismissed the claimant from employment. Her last position in the Institute was "Penolong Pengarah Kanan (Projek Khas)" and her last date of employment was 15 July 2020.

[3] At the outset, it is necessary to state that this appeal is not concerned with whether the claimant had committed misconduct warranting dismissal or the merits of the claimant's representation under s. 20(1) of the Act (which is under Part VI of the Industrial Relations Act 1967) that she had been dismissed by the Institute without just cause or excuse. The claimant's representation was referred by the Director General of Industrial Relations to the Industrial Court for adjudication *via* Industrial Court Case No. 14/4-1675/21 ("the case"). After the requisite pleadings had been filed, namely the claimant's statement of case dated 2 July 2021, the Institute's statement in reply dated 3 September 2021 and the claimant's rejoinder dated 30 September 2021, the Institute relied on s. 52 of the Act and filed an

application dated 12 October 2021 pursuant to s. 29(fa) and s. 29(g) of the Act ("the s. 52 application") seeking (1) that the case be struck off; and/or (2) any other reliefs or order that the Industrial Court deems fit and proper.

[4] Essentially, the Institute contended that the Industrial Court had no jurisdiction as they are a Government agency. The Institute relied, *inter alia*, on a letter issued by the Prime Minister's Office ("PMO") dated 24 January 2007, which states that the Institute is an agency within the PMO. The letter reads relevantly as "Institut Integriti Malaysia (IIM) adalah sebuah agensi Kerajaan sepenuhnya yang diletakkan di bawah pentadbiran Jabatan Perdana Menteri."

[5] According to the Institute, the Industrial Court lacked jurisdiction pursuant to s. 52 of the Act. Section 52 reads as follows; "(1) Parts II, III, IV, V and VI shall not apply to any Government service or to any service of any statutory authority or to any workman employed by Government or by any statutory authority." The Institute's grounds for the s. 52 application are summarised as follows:

(i) that the Institute serves the Government through the Prime Minister's Department;

(ii) that the Institute is a Government agency and part of the National Centre for Governance, Integrity and Anti-Corruption ("GIACC") which is a department in the Prime Minister's Office ("PMO");

(iii) that the Industrial Court lacks the threshold jurisdiction to hear and/or want of jurisdiction to hear and determine this reference to its completion.

(iv) that the Institute is not within the jurisdiction of the Industrial Relations Act 1967 as it is a Government agency and/or is performing the role in service to the Government.

(v) that the Institute is a Government Agency and/or Department under the PMOe and exercises duty and function in service of the Government.

(vi) that the operational funding including the salary of employees of the Institute is provided and allocated by the Federal Government *via* the Prime Minister's Office.

[6] The Industrial Court allowed the s. 52 application per Award No. 129/2022 dated 19 January 2022 ("the award") and the case was accordingly struck out. See: *Roziah Harun v. Institut Integriti Malaysia* [2022] 1 ILR 461.

[7] The claimant applied to the High Court for judicial review to quash the award. By a decision delivered on 7 March 2023, the High Court allowed the application for judicial review and granted *certiorari* and quashed the award and granted an order of *mandamus* for the case to be remitted to the

Industrial Court for it to be heard on merits. See: *Roziah Harun v. Institut Integriti Malaysia & Anor* [2023] CLJU 2914; [2023] 1 LNS 2914; [2023] AMEJ 2964; [2023] MLJU 3261.

Issues

[8] The first question, at the heart of the appeal, is whether the Institute is a Government agency and therefore within the ambit of s. 52 of the Act. The second question (which is no less important) is whether a jurisdictional objection based on s. 52 of the Act may be taken up by way of an application to the Industrial Court under s. 29(fa) of the Act or whether, as per the Supreme Court's decision in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777; [1997] 1 MELR 10; [1997] 2 MLJ 685 ("*Kathiravelu*'s case"), the Institute ought to have filed a judicial review to quash the decision of the Director General of Industrial Relations (per s. 20(3) of the Act) to refer the claimant's representation to the Industrial Court.

Industrial Court

[9] The Industrial Court allowed the s. 52 application and concluded (per the award) that pursuant to s. 52 of the Act, it had no jurisdiction to hear and determine the claimant's representation under s. 20 of the Act. The relevant parts of the Industrial Court's decision, which dealt with the issue at hand are as follows:

> **Decision**
>
> [15] The respondent was established on 4 March 2004 under the Companies Act 1965 with the objective to coordinate, monitor and evaluate the implementation of the National Integrity Plan (PIN). In January 2019, PIN was replaced with the National Anti-Corruption Plan (NACP).
>
> [16] The NACP was developed by the National Centre for Government, Integrity and Anti-Corruption (GIACC) with the main objective that every public and private institution in the country to implement initiatives in overcoming governance, integrity and corruption issues for the next five years.
>
> [17] The NACP's vision is to create a corrupt-free nation through three specific goals which are Accountability and Credibility of Judiciary, Prosecution and Law Enforcement Agencies; Efficiency and Responsiveness in Public Service Delivery, and Integrity in Business.
>
> [18] The respondent is the operational body of GIACC with the aim to develop the capabilities and competencies of the public and private sectors on matters pertaining to governance, integrity and anti-corruption, which ultimately aims to make Malaysia known for her integrity and not corruption.
>
> [19] Based on the letter dated 24 January 2007 purportedly issued by the Prime Minister Department, the Respondent is a government agency under the administration of the Prime Minister Department.

A [20] The claimant had exhibited a letter from GIACC dated 25 October 2021 seeking a confirmation on the status of the Respondent. However, in the letter, GIACC only confirms that it is an agency under the Prime Minister's Department and that GIACC does not have the capacity from the point of law to confirm whether the respondent is a government agency or otherwise (GIACC adalah agensi di bawah Jabatan Perdana B Menteri ...) (GIACC tidak mempunyai kepastian dari segi perundangan untuk mengesahkan kedua-dua isu yang dibangkitkan itu.)

[21] The letter of reply dated 2 November 2021 from Jabatan Perkhidmatan Awam Malaysia only confirms that the respondent is not an agent of "Perkhidmatan Awam Malaysia". Nowhere in the letter does C it state that the respondent is not in service with the Government or other government departments.

[22] The Operational Budget of the respondent is from the Federal Government where the Prime Minister's Department allocates funds for the respondent.

D [23] The claimant contends that the respondent is a company incorporated under Suruhanjaya Syarikat Malaysia (SSM) and that the Respondent generates revenue and profit *etc*. In the case of *Muhammad Ghazali Abdul Aziz v. Pembangunan Sumber Manusia Berhad* [2020] 3 ILR 358 (Award No. 696 of 2020) the court held that:

> E The term "statutory authority" is a generic term which can include any authority or body established, appointed or constituted by any written law. It is not limited to a body expressly established or incorporated under a particular statute of Act of Parliament and it can include body corporates such the respondent company which had been established and/or appointed by a written law, *ie*, the F PSMB Act.
>
> The mere fact that it had been established under the Companies Act had not precluded it from being a statutory authority. The Companies Act had merely brought the respondent company into existence by giving it life in the form of a legal entity in law.

G [24] The term "statutory authority" is defined in s. 2 of the IRA 1967 as follows:

> "Statutory authority" means an authority or body established, appointed or constituted by any written law, and includes any local authority. (*Hila Ludin Abu Hazim lwn. Malaysia-Thailand Joint* H *Authority (No. 2)* [2001] 5 CLJ 336).

[25] Even though the respondent is a company incorporated under the Companies Act 1965, there are no shareholders in the respondent as it is a Company Limited by Guarantee. This only solidifies *the status of the respondent that it does not actually operate as a commercial entity and the* I *establishment of the Prime Minister's Department was for a specific purpose and aim.*

[26] The claimant asserts that *she is not a government servant.* In deciding whether the respondent is a statutory authority, the fact the claimant is or isn't a government servant is irrelevant and not a consideration to be

factored. In support, it was held in the case of *Suseela K S Malakolunthu v. Malaysian-American Commission on Educational Exchange (MACEE)* [2020] 4 ILR 355 (Award No. 1453 of 2020) that:

> On the claimant's contention that she had not been a government servant or in government service, s. 52(1) of the IRA had not mentioned government servant. Thus, the issue of whether she had been a government servant or not, had been irrelevant.

[27] The Operational Budget of the respondent is from the Federal Government where the Prime Minister's Department allocated funds for the respondent. The Industrial Court in upholding that the Malaysian-American Commission on Educational Exchange is a statutory authority, made the following remarks in the case of *Ng Boon Leh v. Malaysian-American Commission On Educational Exchange (MACEE)* [2020] ILRU 0284; [2020] 2 LNS 0284 (Award No. 284 of 2020):

> By virtue of this provision, *it is clear that the Commission is funded by the Government as it is a government entity.* It would therefore mean the employees engaged by the Commission are employed by the Government of Malaysia and the salaries of the employees were borne by the Government of Malaysia from the government funds.

[28] The claimant's contention is also that *she is not subjected to "Peraturan Lembaga Tatatertib Perkhidmatan Awam 1993" and no general orders applicable to the government servants was stated in her "Surat Tawaran Perlantikan" dated 13 August 2007.* The contention is misconceived. Item 10 in the "Surat Tawaran Perlantikan" dated 13 August 2007 state that claimant shall also adhere to any rulings issued by the respondent from time to time. In 2014 the Employee's handbook (Terma dan Syarat perkhidmatan Pegawai IIM) was issued whereby in *para. 2(3) on "Pemakaian" states that any General Order, Directions of the Government that is not in conflict of the terms shall be applicable to employee in the event that the company does not have any rulings as regards to the matter.* In the *Ng Boon Leh* (*supra*) the court held that:

> The court is of the view that the Government is not legally compelled to make appointments of employees to be governed by General Orders, Directions of Administrations and Circulars as existed in the government services. The Government has the discretion to make services appointments based on any mechanisms it chooses and deems.

[29] On the applicability of *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 that reference by the Honourable Minister in violation of the provisions of the IRA would not confer a threshold Jurisdiction to the Industrial Court. It was held in the case of *Morni Bujang v. Pembangunan Sumber Manusia Berhad* [2021] 2 ILR 252 (Award No. 475 of 2021) that:

> The Industrial Court has had the opportunity to consider the issue of conferment of the threshold jurisdiction in the case of *Hamid Sulaiman v. Pertubuhan Peladang Kebangsaan (NAFAS)* [2019] 4 ILR 542 (Award No. 2576 of 2019), wherein the Court held that where

A the reference of the Minister is found to be in violation of s. 52 of the IRA, the said reference would constitute the exceptional situation that was perceived by his Lordship Gopal Sri Ram JCA in the case of *Kathiravelu Ganesan & Anor v. Kojasa Holding Bhd* (*supra*) as a situation when the Minister lacks the power to confer threshold jurisdiction upon the Industrial Court. In that situation, B the Industrial Court need not proceed to hear and determine the dispute for it lacks the jurisdiction to do so.

[30] The same notion was shared by the case of *Muhammad Ghazali Abdul Aziz v. Pembangunan Sumber Manusia Berhad* [2020] 3 ILR 358 where it was held that:

C I am conscious of the *dictum* of Gopal Sri Ram JCA in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 where his Lordship has said that the threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference and where a challenge is not thus taken the Industrial D Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question.

Be that as it may, Supreme Court in *Kathiravelu*'s case has affirmed and accepted the *Fung Keong*'s case as establishing a very limited exception thereto only in cases where the Minister had acted in violation of the provision of s. 20(1) of the IRA by referring the E dispute to the Industrial Court when the representations were made to the Director General beyond the statutory time limit. In those circumstances, it was said that the Minister had no power to confer threshold jurisdiction upon the Industrial Court.

[31] The High Court in *Islamic Financial Services Board v. Marlin Fairol Mohd* F *Faroque & Anor* [2010] 8 CLJ 173 has held that:

[16] An issue on jurisdiction of the nature, namely immunity from suit or from legal process, is a question of law which properly speaking should be taken at the outset and without needing to hear the merits of any particular application or suit. Logically, if G there is blanket immunity for any tribunal to even proceed to hear, that tribunal should decide this preliminary issue without proceeding any further on the merits. The *Kathiravelu dictum* should perhaps not be applied on the facts of a case where a preliminary objection is taken on jurisdiction based on the existence of privileges and immunities from suit or legal process.

H Conclusion

[32] Premised on the authorities and reasons stated above as well as the facts of the case, the court is satisfied that the respondent falls within the ambit of s. 52 of the IRA 1967. *The letter of confirmation from the Prime Minister's Department that the respondent is a* I *government agency under the administration of the Prime Minister's Department is cogent and conclusive to show that the respondent is a government agency*. Therefore, the court lacks the threshold

jurisdiction to hear and determine this representation filed by the claimant under s. 20 of the IRA 1967. The application is hereby allowed. The claimant's case is struck off pursuant to s. 29(fa) of the IRA 1967. (emphasis added)

High Court – Judicial Review

[10] The claimant applied to the High Court for judicial review to quash the award. On 7 March 2023, the learned judge of the High Court allowed the claimant's application for judicial review. In summary, the High Court's basis for allowing the judicial review was as follows:

(a) the Claimant's letter of employment does not indicate that she was a government servant or in government service.

(b) the term "agency" in the letter dated 24 January 2007 from the Prime Minister's Officer ("PMO") has no legal connotation and does not mean that the Institute is a statutory creation;

(c) the fact that the Institute is established under the Companies Act and is limited by guarantee with no shareholders does not make it a government entity. Further, as there is no statute creating the Institute, it cannot be a statutory authority;

(d) apart from a contract of employment, employment in public service is also governed by statute or statutory or administrative rules;

(e) Section 52 Industrial Relations Act 1967 is silent on whether an organisation that receives an operational budget from the Government is thereby a statutory authority;

(f) there is no evidence that the termination of the Claimant was based on the Public Officer (Conduct and Discipline) Regulations 1993 ("the 1993 Regulations"). The Institute cannot ignore the Regulations and, at the same time, contend that it falls within the exception in s. 52 Industrial Relations Act 1967; and

(g) the Institute ought to have challenged the reference by the Director General of Industrial Relations by way of a judicial review instead of mounting a challenge on the issue of jurisdiction at the Industrial Court, and that the Claimant's judicial review application should have been allowed on this ground alone.

[11] The relevant parts of the High Court's decision, which explains the learned judge's reasons for allowing the judicial review, are at paras. [27] to [40] of the grounds of judgment. They read as follows:

Analysis

[27] Let me begin by stating that the decisions of the Industrial Court in *Ng Boon Leh* and *Suseela Malakolunthu* were quashed by the High Court in *Ng Boon Leh v. Malaysian-American Commission on Educational Exchange (MACEE) & Anor And Another Application* [2022] 4 ILR 26; [2023] 7 MLJ 28. I will discuss the implication of the judgment of the High Court in the later part of this judgment.

A [28] It should be noted that *para. 6* of the letter of employment of the applicant states as follows:

> Dalam tempoh berkhidmat di IIM, puan adalah setiap masa tertakluk kepada Arahan Pentadbiran IIM, peraturan-peraturan yang sedang berkuatkuasa dan yang akan dikeluarkan dari masa ke semasa.

B There is no indication at all that the applicant was a government servant or in any of the government services. In fact, the usage of the phrases like Arahan Pentadbiran IIM and Syarat-Syarat Perkhidmatan IIM indicates that the applicant is not subject to "any Government service or to any service of any statutory authority" under s. 52 of the IRA.

C [29] I take cognisance that the learned Chairman of the Industrial Court relied on the JPM letter to come to the conclusion that the 1st respondent "falls within the ambit of s. 52 of the IRA". However, one has to recall that the *word "agency" used by the JPM letter has no legal connotation.* It does not mean that the 1st respondent is a statutory creation. There is no D statute that creates the 1st respondent. It is not established under an Act of Parliament.

[30] In my considered view, *the fact that the 1st respondent is established under the Companies Act and limited by guarantee with no shareholders is insufficient to make it a government entity. In the absence of a specific statute that creates the 2nd* E *respondent, it cannot be said that the 2nd respondent is a statutory authority.* With respect, *Muhammad Ghazali Abdul Aziz* was wrongly decided by the Industrial Court and should not be followed. In any event, in that case, the respondent, though incorporated under the Companies Act, was, in fact, established under the Pembangunan Sumber Manusia Berhad Act 2001.

F [31] In quashing the decisions of the Industrial Courts in *Ng Boon Leh* and *Suseela Malakolunthu* Noorin J observed that any employment in the public service is not governed by a mere agreement between the employee servant and the governmental employers but also by statute or statutory or administrative rules made by the Government. Just like *Ng Boon Leh* G and *Suseela Malakolunthu*, it has not been shown under which statute or administrative rules the applicants were subject to in the course of their employment other than the contract of employment.

[32] Learned counsel for the 1st respondent, relying on the judgment of the Industrial Court in *Ng Boon Leh*, submitted that the government is not H legally compelled to make appointments of employees to be governed by general orders, directions of administrations and circulars as existed in the government services. With respect, this proposition is not supported by any authority. On the contrary, in *Government of Malaysia v. Rosalind Oh Lee Pek Inn* [1973] CLJU 38; [1973] 1 MLJ 222, Suffian FJ (sitting at the High Court) held that the contract between a public servant and the I Government is of a special kind, as once appointed the Government servant acquires a status and her rights and obligations are no longer determined by consent of both parties but by statute or statutory or administrative rules made by the Government.

[33] *S. 52 of the IRA does not mention anything that makes any organisation that receives an operational budget from the Government to be a statutory authority. Having a grant from the government does not automatically, without more, make an entity to be a government body.*

[34] There is another aspect of this case. It is this. *There is no evidence that the termination of the applicant was based on the Public Officer (Conduct and Discipline) Regulations 1993 ("1993 Regulations"). Since the termination was not based on the 1993 Regulations, the 1st respondent cannot now insist that the applicant is the government service within the meaning of s. 52 of the IRA. That amounts to approbate and reprobate.*

[35] It is trite that one cannot approbate and reprobate. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. *That is to approbate and reprobate the transaction; see the judgment of Scrutton LJ in Verschures Creameries, Limited v. Hull and Netherlands Steamship Company [1921] 2 KB 608 CA.*

[36] In short, the 1st respondent cannot ignore the procedures stipulated in the 1993 Regulations in terminating the employment of the applicant but, when challenged at the Industrial Court, claimed that the Court is not seized with the jurisdiction since the applicant is in the government service within s. 52 of the IRA.

[37] Finally, as in *Ng Boon Leh* and *Suseela Malakolunthu*, this case involved a reference made by the Minister to the Industrial Court. If indeed the 1st respondent is aggrieved by the Minister's reference, it should have challenged it by way of a judicial review. This is not done. The 1st respondent waited for the matter to be heard at the Industrial Court before mounting the challenge on the issue of jurisdiction. The same issue arose in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 SC. The Supreme Court held that the threshold jurisdiction of the Industrial Court may only be challenged by seeking to quash the Minister's reference and in the same application, ask for an order of prohibition against that court. The threshold jurisdiction of the Industrial Court could not be challenged without joining the Minister and seeking relief against him. On this ground alone, the application should have been allowed.

Findings

[38] For the reasons aforesaid, this application is allowed. The decision of the Industrial Court is tainted with *Anisminic* error and *Wednesbury* unreasonableness to make it amenable to judicial review.

[39] The Award is hereby quashed. A *mandamus* is also issued to direct the Registrar of the Industrial Court to fix a date for the matter to be heard by the Industrial Court. The instant case must be heard in full, where all evidence can be led by the parties.

[40] Costs is fixed at RM5,000 subject to allocatur.

(emphasis added)

Our Decision

The Kathiravelu Objection

[12] Essentially, it was argued for the claimant that based on *Kathiravelu*'s case, the only way to challenge the Director General of Industrial Relations reference under s. 20(3) of the Act is to apply for judicial review. We note that s. 29(fa) of the Act was inserted by the Industrial Relations (Amendment) Act 2007 (Act A1322), which came into force on 28 February 2008, which was well after *Kathiravelu*'s case. Under s. 29(fa), the Industrial Court may, "order a case to be struck off or reinstated". However, parties agree there is no clear explanation given by the Legislature as to the purpose of the amendment and particularly, whether the amendment was meant to overrule the *Kathiravelu*'s case.

[13] For the claimant, it was contended that the Industrial Court's power to strike out a case under s. 29(fa) of the Act would arise in a situation where a claimant failed to attend a mention or the hearing of his/her case and it was not intended to empower the Industrial Court to hear jurisdictional objections based on s. 52 of the Act which ought to be ventilated *via* judicial review. The High Court agreed with the claimant and ruled that on this ground alone, judicial review should be allowed. On the other hand, for the Institute, it was contended that with the amendment and insertion of s. 29(fa), the Industrial Court is empowered to hear an objection based on s. 52 of the Act as a threshold issue without the case proceeding to full trial which would entail much time and resources.

[14] Having considered the matter carefully, we think that it would be an error to read into s. 29(fa), words which do not appear in that section and to construe the section restrictively or at any rate, in such a way as to preclude a party from applying to strike out a case based on, *inter alia*, s. 52 of the Act. Parliament, in its wisdom, has left open the circumstances or the occasions on which the Industrial Court may exercise its power under s. 29(fa) to strike out a case. As such, we are of the view that in the circumstances of the present case (as elaborated in the later part of this judgment), it was wholly appropriate for the Institute to have applied under s. 29(fa) of the Act.

[15] Respectfully, we cannot agree with the claimant's contention and the High Court's ruling that *Kathiravelu*'s case applies and that the Institute ought to have filed for judicial review to quash the reference under s. 20(3) of the Act. In this regard, it is essential to keep in mind that when s. 29 of the Act was amended and (fa) was inserted, Parliament is deemed to know the law, particularly the ruling of the Supreme Court in *Kathiravelu*'s case. The effect of the Supreme Court's ruling in *Kathiravelu*'s case is that, a reference to the Industrial Court, which was based on a workman's representation under s. 20(1) of the Act and made beyond the time prescribed by that section, per *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980]

CLJU 156; [1980] 1 LNS 156; [1981] 1 MLJ 238 may be dealt with by the Industrial Court itself, whereas any other challenge to the Industrial Court's threshold jurisdiction must be taken up by way of judicial review, and not by way of any preliminary objection in the Industrial Court.

[16] The exact passage in *Kathiravelu*'s case (p. 796 (CLJ); p. 699 (MLJ)) is reproduced here:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, *save upon the limited ground that the representations under s. 20(1) were made out of time,* he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication.
>
> *Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, ie*, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act. (emphasis added)

[17] Thus, the position that we take is that, depending on the facts and circumstances, where the evidence is clear and the issue can be dealt with summarily, it is open for a party to take the route *via* s. 29 of the Act to have the case struck out based on a jurisdictional objection under s. 52 of the Act.

[18] On the other hand, there could be cases where the evidence pertaining to an issue may not be so clear cut, particularly where the evidence is credibly disputed such that a full hearing may be necessary to ascertain the true facts before the Industrial Court can reach a decision as to whether, for example, s. 52 of the Act applied to that particular case.

[19] In this regard, we are aware that in the case of *Ng Boon Leh v. Malaysian-American Commission On Educational Exchange (MACEE) & Anor And Another Case* [2022] 4 ILR 26; [2023] 7 MLJ 28, the High Court ruled that "When there was no issue of the claim being made outside time-limit in the present matter, and where MACEE itself did not seek to quash the Minister's referral by way of a *certiorari* to the High Court, it was clear that there was no preliminary issue to be determined by the Industrial Court. The preliminary point raised by MACEE in the Industrial Court must be taken substantively as part of the entire hearing of the applicants' claims where MACEE bore the burden of proving the applicability of s. 52(1) of the IRA. The Industrial Court could not abdicate its statutory duty to hear the entire reference on its merits, and in the course thereof make its findings on the entire dispute".

[20] However, it is material to note that in *Ng Boon Leh*'s case, the High Court also ruled that, "There was insufficient evidence or proof to show that the applicants came within the exception to the Industrial Court's jurisdiction under Part VI of the IRA which was a burden to be discharged by MACEE. The Industrial Court's jurisdiction over the representation could not be barred under s. 52(1) of the IRA. The present matter must be heard in full and where all evidence had been led by the parties."

[21] To conclude on the point that was discussed above, we do not agree that in all cases, it is necessary for the jurisdictional objection under s. 52 of the Act to be taken up at a full hearing. As stated earlier, it will all depend on the facts and circumstances. Thus, to say that every case where s. 52 of the Act is being invoked must proceed to a full hearing would in our view, render s. 29(fa) of the Act totally redundant and otiose.

[22] In our view, s. 29(fa) of the Act may be invoked in a fit and proper case – where the evidence points conclusively that s. 52 of the Act applies to oust the jurisdiction of the Industrial Court. The imperative question is whether in the present case, it was appropriate to invoke s. 52 of the Act by way of the impugned application. The next part of this judgment deals with this question.

The Merits (Section 52 Of The Industrial Relations Act 1967)

[23] We now deal with the merits. The imperative question is whether s. 52 of the Act applies to the facts and circumstances of the present case and this turns on the singular question of whether the Institute is a Government agency? The Industrial Court agreed with the Institute and held that it was a Government agency. At para. [32] of the award, the Industrial Court opined that, "The letter of confirmation from the Prime Minister's Department that the (Institute) is a Government agency under the administration of the Prime Minister's Department is cogent and conclusive to show that the (Institute) is a Government agency".

[24] On the other hand, the High Court took the view that the word "agency" used by the PMO per their letter dated 24 January 2007 "has no legal connotation". The learned judge went on to say rather curiously that, "It does not mean that the (Institute) is a statutory creation. There is no statute that creates the (Institute). It is not established under an Act of Parliament". We say curiously because it was never the Institute's position that they are a creature of statute – a statutory body.

[25] The Institute's position is that whilst they are a company limited by guarantee, they are a Government agency and that their employees are deemed to be in the service of the Government (s. 52 of the Act). The Institute augmented their argument by demonstrating that funding for their operational budget comes from the Government of Malaysia. Further, the Chairman of the Board is the Ketua Setiausaha Negara (KSN) appointed by

the Honourable Prime Minister. Two other directors are from the Government sector. The Institute is listed as an agency of the PMO per the PMO's website. Further, the Institute is also gazetted as a department/ agency under the PMO. See: Ministerial Function Act 1969 and the subsidiary legislation thereunder, namely, Jadual Menteri-Menteri Kerajaan Persekutuan Dan Fungsi-Fungsi Mereka (duly gazetted), which shows that the Institute is under the PMO. The Institute's Annual Report 2020 explains its vision, mission and objectives. It reads:

> *Institut Integriti Malaysia (IIM) ditubuhkan di bawah Akta Syarikat pada 4 Mac 2004 dan berfungsi sebagai syarikat berhad menurut jaminan (GLBG) di bawah Jabatan Perdana Menteri (JPM)* bagi tujuan mengkoordinasi, memantau dan menilai pelaksanaan Pelan Integriti Nasional (PIN). Seiring dengan hala tuju baharu negara, bermula Januari 2019, IIM diamanahkan sebagai badan operasi untuk membangunkan kapasiti dan kompetensi sektor awam dan swasta menerusi penawaran instrument, produk dan menyediakan perkhidmatan latihan yang mencakupi aspek governans, integriti dan antirasuah.
>
> Fungsi IIM juga selari dengan visi Pelan Antirasuah Nasional (NACP) yang mana sasarannya adalah untuk mewujudkan sebuah negara yang bebas rasuah melalui tiga matlat khusus iaitu Kebertanggungjawaban dan Kredibiliti Kehakiman, Pendakwaan dan Agensi Penguatkuasaan Undang-Undang, Penyampaian Perkhidmatan Awam yang Cekap dan Responsif; dan Integriti dalam Perniagaan. IIM telah membangunkan pelbagai produk, instrument dan program latihan bagi membantu sektor awam, swasta dan pihak berkepentingan dalam meningkatkan tahap integriti serta menyediakan penyelesaian antirasuah dan tadbir urus di seluruh negara.

[26] We do not agree with the High Court's opinion that the term "Government agency" has no legal connotation. Our view is quite to the opposite. In our opinion, it is incongruous to say that the words "Government agency" have no legal connotation when these words are in fact found in several legislation. For instance, the words "Government agency" are found in the Service Tax Regulations 2018 ("STR") which is a subsidiary legislation under the Service Tax Act 2018. According to reg. 3 of the STR, taxable persons and taxable services and the total value of taxable services shall be as specified in the First Schedule to the STR. Item 8, Group I (Other Service Providers) of the First Schedule to the STR provides as follows:

> Any person, **Government agency,** local authority or statutory body who provides advertising services. (emphasis added)

See: *Redberry Ambient Sdn Bhd v. Tribunal Rayuan Kastam & Anor* [2024] 7 CLJ 66 (CA).

[27] We also noted that in s. 2 of the Statutory Bodies (Accounts and Annual Reports) Act 1980 (Act 240), "statutory body" is defined as "any body corporate, irrespective of the name by which it is known, that is

incorporated pursuant to the provisions of Federal law and is a public authority or an agency of the Government of Malaysia but does not include a local authority and a body corporate that is incorporated under the Companies Act 1965 (Act 125)".

[28] And in s. 4 of the Statutory Bodies (Discipline And Surcharge) Act 2000 (Act 605), an "officer" is defined as:

> a person who is employed on a permanent, temporary or contractual basis by a statutory body, and is paid emoluments by the statutory body, and includes a person who is seconded to any subsidiary corporation or company of the statutory body or any other statutory body or any Ministry, department or **agency of the Federal Government or any department or agency of the Government of any State** or any company in which the Federal Government or the Government of any State has an interest; (emphasis added)

[29] We also noted that the words "Government agency" is stated in s. 18 of the Malaysian Aviation Commission Act 2015 (Act 771). That section reads:

> (1) The Commission shall have the power to do all things necessary or expedient for or in connection with the performance of its functions under this Act.
>
> (2) Without prejudice to the generality of subsection (1), the powers of the Commission shall include the power:
>
> (a) to carry on all activities which appears to the Commission to be requisite, advantageous or convenient for or in connection with the performance of its functions;
>
> (b) to co-operate or act in association with any **government agency,** any company or corporation, or any body or person, whether local or foreign;
>
> (emphasis added)

[30] Further, s. 84(13) of the Patents Act 1983 provides as follows:

> (13) In this section **"Government agency"** means the Federal Government or the Government of a State and includes a Ministry or Department of that Government. (emphasis added)

[31] In light of the above statutory provisions touching upon the term Government agency or words to that effect, we think that it was a misdirection for the learned judge to have concluded or remarked that the word "agency", which appeared in the PMO letter dated 24 January 2007 "has no legal connotation". On the contrary, all indications are that the word Government agency ("agensi Kerajaan") is pregnant with legal meaning and connotation.

[32] We move on to consider the relevant and indeed obvious question that necessarily arises is – what constitutes a "Government agency"? In this regard, the Perak Housing and Real Property Board Enactment 2016, defines "Government agency" as:

> any ministry, department, office, agency, authority, commission, committee, board, council or other body, incorporated or unincorporated, of the Federal Government, State Government or local government, whether established under written law or otherwise

[33] Further, in the Preservation of Public Security (Sabah) Regulations 2013 (PUA(A) 103/2013), Government agency is defined as:

> (a) Any Ministry, department, office, agency of the Federal Government or of any State Government or local government; and
>
> (b) Any relevant authority, corporation or other body, corporate or unincorporated, of the Federal Government or of any State Government or local government, whether established under written law or otherwise;

[34] We gratefully adopt the meanings given in paras. [32] and [33] as correctly defining or framing the meaning of "Government agency".

[35] In the context of the present discussion on the topic of Government agency, we also think that it is highly relevant and appropriate to refer to the illuminating decision of the Indian Supreme Court in *Ramana Dayaram Shetty v. International Airport Authority Of India And Others* [1979] 2 SCC 489 where Justice Bhagwati lucidly explained the key attributes or imperatives of an agency of the Government in the following paragraphs:

> 14. A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a corporation is wholly controlled by Government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government.
>
> ...
>
> 15. But if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government.
>
> ...
>
> It may, therefore, be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. But where financial assistance

A is not so extensive, it may not by itself, without anything more, render the corporation an instrumentality or agency of government, for there are many private institutions which are in receipt of financial assistance from the State and merely on that account, they cannot be classified as State agencies. Equally a mere finding of some control by the State would not be determinative of the question "since a State has considerable measure
B of control under its police power over all types of business operations". But "a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action". *Vide Sukhdev v. Bhagatrama* …

16. If the functions of the corporation are of public importance and closely
C related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J, in *Sukhdev v. Bhagatram* (*supra*) where the learned Judge said that "institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed
D government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions.

[36] In the present case, the claimant sought to portray that although there was funding from the PMO, the Institute was nevertheless a profit-making
E enterprise and to this end, referred to the fact that in 2020, the Institute achieved 69% of their annual target of RM1.6 million – RM1.2 million. Clearly the evidence shows that the Institute is a key component of the Government's national anti-corruption effort. The Government relies on the Malaysian Anti-Corruption Commission (MACC), the National Centre of
F Governance, Integrity and Anti-Corruption ("GIACC") and the Institute to eradicate corruption in the public sector and private sector.

[37] To this end, the Institute undertook consultancy work, carried out training and sold products relevant to its purpose, and these generated an income of RM1.2 million for 2020. We do not agree that the mere fact that
G the Institute generated an income in 2020 detracts from its status as a Government agency, bearing in mind that it functions as an instrument of Government and its primary purpose and mission of to create awareness and instil the value of "integrity" at all levels of society (public and private sector).

H **[38]** In this regard, the Institute's vision is – "making Malaysia towards a country of high integrity and recognised at the national and international level". Their "Mission" is:

(i) to become the Premier Think-Tank of integrity at the national and international level.
I

(ii) to be an advisory body on policy, research, and evaluation related to strengthening integrity and governance that is recognised at the national and international levels.

(iii) to be the national and international main integrity strategic body.

(iv) to be an organisation that excels in premier national integrity education, advocacy, and training.

(v) as a mediator to spread the message of integrity and governance to the Malaysian community.

[39] The Institute does all of the above by various methods. How they do it is not relevant for present purposes. What is important is to acknowledge the Institute's purpose and its objectives. Thus, the fact that they generate income whilst achieving their mission and purposes does not make them a commercial or private entity in the way that is being suggested by the claimant. Put in another way, the mere fact that they generate an income does not mean that they are not a Government agency.

[40] In this connection, we think that it is appropriate and relevant to refer to the letter dated 24 January 2007 from the PMO. The said PMO letter is reproduced here:

> Jabatan Perdana Menteri
> Blok B8
> Pusat Pentadbiran Kerajaan Persekutuan
> 62502 Putrajaya
> Malaysia.
>
> Ruj. Tuan:
> Ruj. Kami: PM10766 Jld.36
> Tarikh: 24 Januari 2007
>
> **Kepada Pihak-pihak Yang Berkenaan**
>
> Tuan,
>
> **Institut Integriti Malaysia (IIM)**
>
> Dengan hormatnya saya diarah merujuk perkara seperti di atas.
>
> 2. Dengan hormatnya sukacita Jabatan Perdana Menteri mengesahkan bahawa **Institut Integriti Malaysia (IIM) adalah sebuah agensi Kerajaan sepenuhnya yang diletakkan di bawah pentadbiran Jabatan Perdana Menteri.**
>
> Sekian, terima kasih.
>
> "BERKHIDMAT UNTUK NEGARA"
>
> Saya yang menurut perintah,
>
> (Abu Bakar bin Muhammad)
>
> Ketua Penolong Setiausaha (B)T
> Bahagian Pengurusan Perkhidmatan dan
> Sumber Manusia (BPPSM)
> b.p. Ketua Setiausaha Negara
> JABATAN PERDANA MENTERI (emphasis added)

[41] The High Court seemed to think that the said PMO letter is irrelevant and had no value at all. This is because the said letter does not give any reason or context for its issuance. In our view, the PMO letter is self-explanatory and confirms that the Institute is a Government agency which is under the PMO. Nothing could be clearer from that. And there is nothing thereafter to debunk the contents of the said PMO letter. On the contrary, all the evidence points in the direction of the PMO having overarching jurisdiction or domain over the Institute.

[42] In this regard, we refer to the email dated 16 November 2020 from Puan Norshimah binti Shahrudin (from the PMO) to the Institute. The email pertains to the 2021 funding by the PMO to the Institute. It reads as follows:

> From: Norshimah binti Shahrudin (noshimah@jpm.gov.my)
>
> Date: 16/11/2020 05:13 pm
>
> To: Puan Nor'afiza Saim (norafiza@integriti.my), Norliana bt Ali Akbar (norliana@integriti.my)
>
> Subject: FW: Penting: Maklumat ABM 7 Buku Bajet 2021 Jabatan Perdana Menteri – Institut Intergriti Malaysia
>
> Assalamualaikum warahmatullahi wabarakatuh dan Salam Sejahtera.
>
> YBhg. Tan Sri Datuk/Dato' Seri/Dato/Datin/Dr./Tuan/Puan,
>
> Dengan segala hormatnya saya diarah merujuk kepada perkara di atas.
>
> 2. Dimaklumkan bahawa sejumlah *(redacted)* telah diluluskan kepada *Institut Intergriti Malaysia (IIM) bagi Perbelanjaan Mengurus Tahun 2021.* Bersama-sama ini dikemukakan ABM-7 Tahun 2021 untuk makluman dan perhatian YBhg. Tan Sri/Datuk/Dato' Seri/Dato/Datin/Dr/Tuan/Puan selanjutnya.
>
> 3. Semua jabatan/*agensi*/badan berkanun/syarikat *Kerajaan hendaklah meneliti, merancang dan menyusun keutamaan/keperluan bagi mencapai keberhasilan yang ditetapkan tertakluk kepada jumlah peruntukan yang telah diluluskan sahaja. Sebarang perubahan perancangan dan perbelanjaan* jabatan/*agensi*/badan berkanun/syarikat Kerajaan hendaklah ditanggung menggunakan peruntukan sedia ada yang telah diluluskan tanpa peruntukan tambahan selain daripada pertimbangan oleh Kementerian Kewangan (MOF), Penyaluran peruntukan kepada badan berkanun dibuat berdasarkan kepada keperluan aliran tunai dan prestasi pelaksanaan program/aktiviti/projek yang telah dipersetujui dan merujuk kepada Perkeliling Perbendaharaan Malaysia bagi Anggaran Perbelanjaan Persekutuan 2021.
>
> 4. Perhatian dan kerjasama YBhg. Tan Sri/Datuk/Dato Seri/Dato/Datin/Dr/Tuan/Puan berhubung perkara di atas amatlah dihargai.
>
> Sekian, terima kasih.
>
> 'BERKHIDMAT UNTUK NEGARA'
>
> "Kualiti Dijulang Prestasi Terbilang"
> "Memartabatkan Akauntabiliti Membudayakan Integriti"

Saya yang menjalankan amanah,

(Mohd Sabri bin Seman)
Unit Bajet, Bahagian Kewangan
Jabatan Perdana Menteri (emphasis added)

[43] The funding that was given by the PMO to the Institute comes with clear guidelines and conditions that the relevant Government department/ agencies must plan and prioritise the use of the monies from the PMO so as to achieve the stated goals and objectives. It is clear that the Institute does not have a "free-hand" to use the funds from PMO in any manner as they should choose. We note that apart from having their own external auditors, the Institute are also subject to audit by the Auditor-General.

[44] We may now refer to a letter written by the claimant's solicitors, Tetuan Kamini Lavenyia & Associates letter dated 7 October 2021 to GIACC. The letter reads as follows:

Ruj Kami : KLA/E/0041-21
Tarikh : 7.10.2021

Ketua Pengarah
Pusat Governans, Integriti dan Anti-Rasuah Nasional (GIACC)
Jabatan Perdana Menteri
Aras 3, Blok Barat, Bangunan Perdana Putra
Pusat Pentadbiran Kerajaan Persekutuan
62520 Putrajaya.

YBhg. Datuk Seri,

Per: Permohonan Untuk Mendapatkan Pengesahan Terkini Syarikat Institut Integriti Malaysia (IIM)

Dengan hormatnya kami merujuk kepada perkara di atas

2. Kami merupakan firma guaman Tetuan Kamini Lavenyia & Associates yang mewakili anakguam kami bernama Puan Roziah binti Harun, mantan pegawai IIM.

3. Pihak kami dengan rendah diri menulis ke pejabat YBhg. Datuk Seri untuk mendapatkan pengesahan berhubung status Institut Integriti Malaysia (IIM). Pengesahan status tersebut adalah amat penting dalam pertikaian Mahkamah Perusahaan Kes No. 14/4-1675/21 di mana kes ini merupakan suatu kes pemecatan anakguam kami dan salah satu isu yang perlu diputuskan oleh Mahkamah adalah sama ada IIM adalah sebuah agensi Kerajaan sepenuhnya atau sebuah syarikat yang bukan merupakan suatu agensi Kerajaan.

4. Pihak kami telah membuat penyelidikan dan mendapati bahawa IIM adalah sebuah syarikat yang bukan merupakan suatu agensi Kerajaan berdasarkan fakta-fakta berikut, antaranya:

4.1 IIM sebuah Syarikat Berhad Terhad Dengan Jaminan (CLBG-Company Limited By Guarantee) yang diperbadankan di bawah Akta Syarikat 1965 (Pindaan Akta Syarikat 2016) dengan No. Pendaftaran Syarikat 644452-P;

4.2 IIM ditadbir (Governing Body) oleh Ahli Lembaga Pengarah yang dilantik mengikut Artikel Persatuan IIM (M&A);

4.3 IIM mengguna pakai skim perkhidmatan yang digubal sendiri iaitu "Terma dan Syarat Perkhidmatan IIM". Semua urusan Perlantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan pegawai IIM adalah mengikut peraturan dan tatacara IIM sendiri dan tidak mengikut peraturan dan tatacara yang ditetapkan oleh Suruhanjaya Perkhidmatan Awam atau tertakluk kepada syarat Suruhanjaya berkenaan mahu pun tergolong di bawah Peraturan 132 Perlembagaan Persekutuan;

4.4 Skim Pencen tidak ditawarkan kepada pegawai IIM sebaliknya semua pegawai IIM mencarum kepada Kumpulan Wang Simpanan Pekerja sebagaimana entiti swasta;

4.5 Pegawai IIM tidak menerima faedah perkhidmatan seperti kemudahan perubatan di hospital kerajaan secara percuma sebaliknya menikmati perlindungan insuran yang disediakan oleh IIM;

4.6 IIM menggunakan sumber rujukan utama sebagai punca kuasa iaitu "Terma dan Syarat Perkhidmatan IIM" dalam aspek berkaitan pengurusan perkhidmatan, dan "Peraturan dan Tatacara Kewangan dan Akaun IIM" dalam aspek berkaitan pengurusan kewangan. Ini berbeza dengan agensi Kerajaan sepenuhnya yang merujuk kepada Perintah Am dan Arahan Perbendaharaan yang dikeluarkan oleh Kerajaan;

4.7 IIM diletakkan di bawah Jabatan Perdana Menteri (JPM) hanya bagi tujuan penyaluran Geran Tahunan di mana IIM beroperasi menggunakan Geran Tahunan yang diberikan Kerajaan melalui JPM. Bagaimana pun JPM bukan Pegawai Pegawal IIM.

4.8 IIM adalah entiti komersial yang menjalankan perniagaan (latihan dan runding cara) untuk menjana pendapatan seperti organisasi komersial yang lain;

4.9 IIM berdaftar di bawah Suruhanjaya Syarikat Malaysia (SSM) dan tertakluk ke di bawah Seksyen 17(A) Akta SPRM;

4.10 IIM turut melibatkan diri dalam sektor pelaburan menggunakan Geran Tahunan yang diterima. Amalan ini tidak berlaku di agensi Kerajaan sepenuhnya; dan

4.11 Penstrukturan Organisasi di IIM berlaku hamper setiap kali Ketua Pegawai Eksekutif baharu menerajui IIM.

5. Berdasarkan fakta-fakta di atas, pihak kami memohon untuk mendapat pengesahan *sama ada IIM merupakan sebuah syarikat yang bukan merupakan sebuah agensi kerajaan atau sebuah agensi Kerajaan sepenuhnya, dan sama ada Skim Perkhidmatan IIM adalah Perkhidmatan Awam atau Perkhidmatan Swasta.*

6. Pihak kami dengan rendah diri memohon untuk mendapat maklum balas daripada pejabat YBhg Datuk Seri dengan kadar yang segera mengambilkira pertikaian yang dirujuk telah pun ditetapkan untuk pendengaran dan pihak kami perlu menyediakan balasan berkenaan dalam tempoh 10 hari dari tarikh surat ini.

7. Pihak kami juga memohon daripada pejabat YBhg. Datuk Seri untuk membekalkan alasan-alasan bagi jawapan sama ada IIM adalah sebuah syarikat yang bukan merupakan suatu agensi Kerajaan ataupun IIM adalah sebuah agensi Kerajaan sepenuhnya bagi tindakan lanjut pihak kami.

Segala kerjasama daripada pihak YBhg Datuk Seri didahului dengan ucapan terima kasih.

Yang Benar,

Tetuan Kamini Lavenyia & Associates

(emphasis added)

[45] GIACC replied as follows:

Ketua Pengarah
Pusat Governans, Integriti Dan Antirasuah Nasional (GIACC)

Jabatan Perdana Menteri
Aras 3, Blok Barat,
Bangunan Perdana Putra Pusat Pentadbiran Kerajaan Persekutuan
62502 Putrajaya
Malaysia

GIACC.600-5/1/4 (39)
25 Oktober 2021

Melalui E-mel

Tetuan Kamini Lavenyia & Associates
2-5 (2nd Floor Block 5) No. 30 Jalam Thambypillai
Off Jalan Tun Sambanthan
50470 Kuala Lumpur.

Salam sejahtera Tuan/Puan,

Permohonan Untuk Mendapatkan Pengesahan Status (Syarikat) Institut Integriti Malaysia

Dengan segala hormatnya kami merujuk kepada surat Tetuan Kamini Lavenyia & Associates bertarikh 7 Oktober 2021 (No. Rujukan: KLA/E/0041-21 ("Surat") mengenai perkara di atas.

2. Seperti yang pihak Tetuan sedia maklum, Pusat Governans, Integriti dan Anti-Rasuah Nasional ("GIACC") adalah agensi di bawah Jabatan Perdana Menteri yang berperanan membangunkan dasar dan strategi serta pelan tindakan untuk negara dari segi governans, integriti dan pencegahan rasuah.

3. Oleh yang demikian, berhubung dengan permohonan pihak Tetuan dalam perenggan 5 Surat, *GIACC tidak mempunyai kapasiti dari segi perundangan untuk mengesahkan mengenai kedua-dua isu yang dibangkitkan itu.*

4. Namun dapatan penyelidikan yang telah dilaksanakan oleh pihak Tetuan mengenal status Institut Integriti Malaysia (IIM) sebagai syarikat yang diperbadankan di bawah Akta Syarikat 2016 [Akta 777] sebagai syarikat berhad menurut Jaminan ("CLBG") terpakai iaitu *mempunyai entiti undang-undang berasingan dari GIACC atau Kerajaan Malaysia secara umumnya. Sebagai sebuah CLBG yang beroperasi sebagai institut yang menjalankan aktiviti penyelidikan dan pembangunan kompetensi dalam aspek integriti dan pencegahan rasuah, IIM menerima dana tahunan untuk perbelanjaan operasinya secara pentadbiran daripada bajet GIACC, di bawah peruntukan tahunan Jabatan Perdana Menteri.*

Sekian untuk makluman dan terima kasih.

"WAWASAN KEMAKMURAN BERSAMA 2030"

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(Datuk Seri Mohd Sallehhuddin bin Hassan)

[46] From the said GIACC letter to the claimant's solicitors, it is clear that GIACC did not confirm that the Institute was not a Government agency. Indeed, it is necessary to note that the GIACC did not in any way contradict the PMO letter dated 24 January 2007, which stated that the Institute was a Government agency under the PMO. GIACC did confirm that the Institute carried out research and competency development in integrity and eradication of corruption and that they received an annual budget from the GIACC's own budget, which came from the PMO.

[47] Next, it was contended for the claimant that she was not dismissed pursuant to the Public Officer, (Conduct and Discipline) Regulations 1993 ("1993 Regulations"). The letter dated 2 November 2021 from the Public Services Department ("JPA") to the claimant's solicitors confirmed that the Institute was not an agency of the JPA and that the claimant was not covered by the 1993 Regulations. Interestingly, the JPA directed the claimant's solicitors to refer their queries to the PMO or the Ministry of Finance. In their letter, the JPA said, "... maklumat lanjut berkaitan IIM boleh dirujuk terus kepada Jabatan Perdana Menteri selaku agensi yang mengawal selia atau kepada Kementerian Kewangan Malaysia."

[48] However, the learned judge focussed on the fact that the claimant was not terminated based on the 1993 Regulations and held, "Since the termination was not based on the 1993 Regulations, the (Institute) cannot now insist that the applicant is the Government service within the meaning of s. 52 of the IRA. That amounts to approbate and reprobate" (*sic*).

[49] The said JPA letter dated 2 November 2021 reads as follows:

Jabatan Perkhidmatan Awam, Malaysia
Public Services Department, Malaysia
Blok C1-C3, Kompleks C Pusat Pentadbiran Kerajaan Persekutuan
62510 W.P. Putrajaya
Malaysia

Ruj. Kami: JPA BPO(S)700-3/1/5(2)
Ruj. Tuan: KLA/E/004-21
Tarikh 02 November 2021

Kamini Lavenyia & Associates
2-5 (2nd Floor Block 5)
No: 30, Jalan Thambypillai
Off Jalan Tun Sambanthan 50470 Kuala Lumpur

Tuan,

Permohonan Untuk Mendapatkan Pengesahan Status Terkini Syarikat Institut Integriti Malaysia (IIM)

Dengan hormatnya saya diarah merujuk kepada surat tuan rujukan KLA/E/004-21 bertarikh 7 Oktober 2021 dan diterima oleh Bahagian ini pada 26 Oktober 2021 mengenai perkara tersebut di atas.

2. Sepertimana tuan sedia maklum, Perkhidmatan Awam Malaysia adalah seperti mana yang telah ditetapkan di bawah Perkara 132(1) Perlembagaan Persekutuan. Sebarang pewujudan/pertambahan/pemansuhan perjawatan mana-mana agensi perkhidmatan awam termasuk perkhidmatan awam negeri, badan berkanun dan pihak berkuasa tempatan yang melibatkan perubahan emolumen atau bertambahnya tanggungan Kerajaan perlu mendapat kelulusan Perbendaharan terlebih dahulu sepertimana yang diperuntukkan di bawah Akta Tatacara Kewangan 1957 (Akta 61).

3. Institut Integriti Malaysia (IIM) **bukan** merupakan agensi Perkhidmatan Awam Malaysia kerana sebarang urusan perjawatan/perkhidmatan tidak dirujuk kepada Jabatan Ini selaku agensi pusat dalam pengurusan sumber manusia sektor awam. Selain itu, IIM juga tidak mengguna pakai skim perkhidmatan awam yang berkuatkuasa.

4. Sehubungan itu, **maklumat lanjut berkaitan IIM boleh dirujuk terus kepada Jabatan Perdana Menteri selaku agensi yang mengawal selia atau kepada Kementerian Kewangan Malaysia.**

Sekian dimaklumkan dan terima kasih.

"WAWASAN KEMAKMURAN BERSAMA 2030"

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalan amanah,

(Suhaimi bin Ali @ Pengarah Ahmad)
Bahagian Pembangunan Organisasi
b.p.: Ketua Pengarah Perkhidmatan Awam (emphasis added)

[50] In our view, it is not inconsistent for a Government agency to employ a person on terms and conditions which are dissimilar from the 1993 Regulations. The point here is that the Institute does not seek to suggest that the claimant is a Government servant or a person employed in public service who would be covered by the 1993 Regulations. It is important to reiterate that the Institute's case is that they are a Government agency under the jurisdiction of the PMO, and, *inter alia*, receiving an annual sum for their operational budget. The Chairman is the Ketua Setiausaha Negara (KSN) who is appointed by the Honourable Prime Minister and two other Board members are from the Government sector. Further, any corporate/internal restructuring requires the PMO's greenlight.

[51] In so far as JPA was concerned, the Institute was not their agent and further confirmed that the Institute's employees are not covered by the 1993 Regulations. However, we do not see in what way the JPA letter detracts from the Institute's status as an agency under the jurisdiction of the PMO.

[52] One of the claimant's contentions in seeking to disavow the suggestion that the Institute was a Government agency was that there was an internal restructuring that took place within the Institute and that this could not have taken place if it was truly a Government agency. In this regard, the Institute had pleaded the following in their statement in reply:

> Statement in Reply;
>
> 12. Paragraph 14 of the Statement of Case is denied and the Claimant is subject strict proof. The Company avers had stated as follows:
>
> (a) …
>
> …
>
> (e) Paragraph 14 (i) to (iii) of the Statement of Case is strictly denied and the Claimant is subject to strict proof thereof. In reply to paragraph 14 (ii) of the Statement of Case, the Company contends that upon the appointment of Puan Nor'afiza Binti Saim, "Timbalan Pegawai Eksekutif Syarikat", Deputy Executive Officer (hereinafter referred to as Puan Nor'afiza) of the Company, there was a change in the Company's organizational structure and this is also stated under the job description of Puan Nor'afiza. Further, *the Company avers that the change in the Company's organizational structure was agreed in the Company's Board of Meeting and in the "Jawatankuasa Khas Kabinet Mengenal Antirasuah (JKKMAR) Siri 4 Bil. 4 Tahun 2018" chaired by the Prime Minister.* (emphasis added)

[53] The claimant sought to rebut this in her rejoinder, which reads (in Bahasa Malaysia):

> 9. Yang Menuntut merujuk kepada *perenggan 12(a) Statement in Reply* dan *menafikan* bahawa perubahan dalam penstrukturan organisasi Syarikat telah dinyatakan di dalam deskripsi kerja "job description" Puan Noraliza dan perubahaan dalam struktur organisas) Syarikat adalah dipersetujui di

dalam Minit Mesyuarat Syarikat dan di dalam "Jawatankuasa Khas Kabinet Mengenai Antirasuah" (JKKMAR) Siri 4 Bil. 4 Tahun 2018 *yang dipengerusikan oleh Perdana Menteri dan meletakkan Syarikat di atas beban bukti yang kukuh.* (emphasis added)

[54] In the circumstances of the present case, it is insufficient for the claimant to merely put the Institute to "strict proof" when the evidence is quite overwhelming – that the Institute is undoubtedly a Government agency within the PMO. In our view, the Institute's internal restructuring was done with the Honourable Prime Minister's approval.

[55] On the issue of funding by the PMO, the learned judge took the view that funding by the Government does not make an entity a Government body. The learned said [33]:

[33] S. 52 of the IRA does not mention anything that makes any organisation that receives an operational budget from the Government to be a statutory authority. Having a grant from the government does not automatically, without more, make an entity to be a government body.

[56] In the present case, it is not just funding alone, but all the other facets and attributes of the Institute's inextricable connection with and answerability to the PMO that suggests quite convincingly that they are a Government agency. The following (indisputable) facts, which the Industrial Court had correctly observed in the introductory parts of the award are in our view, also relevant to the discussion on the issue of whether the Institute is a Government agency:

[15] The [Institute] was established on 4 March 2004 under the Companies Act 1965 with *the objective to coordinate, monitor and evaluate the implementation of the National Integrity Plan (PIN). In January 2019, PIN was replaced with the National Anti-Corruption Plan (NACP).*

[16] The NACP was developed by the National Centre for Government, Integrity and Anti-Corruption (GIACC) with the main objective that every public and private institution in the country to implement initiatives in overcoming governance, integrity and corruption issues for the next five years.

[17] The NACP's vision is to create a corrupt-free nation through three specific goals which are Accountability and Credibility of Judiciary, Prosecution and Law Enforcement Agencies; Efficiency and Responsiveness in Public Service Delivery, and Integrity in Business.

[18] *The [Institute] is the operational body of GIACC with the aim to develop the capabilities and competencies of the public and private sectors on matters pertaining to governance, integrity and anti-corruption, which ultimately aims to make Malaysia known for her integrity and not corruption.*

[19] Based on the letter dated 24 January 2007 purportedly issued by the Prime Minister Department, *the [Institute] is a government agency under the administration of the Prime Minister Department.* (emphasis added)

[57] Applying the judicial guidelines that were enunciated by the Indian Supreme Court in *Ramana Dayaram Shetty*'s case at para. [19] of the judgment, to the facts of the present case, and having due regard to the statutory definitions at paras. [32] and [33] of this judgment, we are impelled to the conclusion that the Institute was an integral part of the Government's national anti-corruption plan and all its objectives, functions and efforts are geared towards achieving the Government's desire to have a corruption-free public and private environment. It can also be seen from the documents and evidence and the circumstances here that the Institute is engaged in matters of high public interest and performing a public function. On that analysis, it can be said that the Institute was carrying out the functions entrusted to it and is not a free-standing commercial or private entity, but is in pith and substance, an instrumentality or agency of the Government.

[58] Thus, in the final analysis, the conclusion or inference that the Institute is a Government agency is in our view, quite inescapable and irrefutable. In our view, the High Court fell into error in disregarding the PMO letter dated 24 January 2007 and in glossing over all the evidence which were effectively building-blocks to establish that the Institute was a Government agency under the PMO. Thus, we agree with the Industrial Court that the Institute is a Government agency and that by virtue of s. 52 of the Act, the Industrial Court lacked the requisite jurisdiction to hear and determine the claimant's representation under s. 20(1) of the Act.

[59] For completeness, we state that the evidence to support the conclusion that the Institute is a Government agency is clear and compelling. As such, the s. 52 application was validly made under s. 29(fa) of the Act. Consequently, we have no hesitation in rejecting the *Kathiravelu* objection, which was raised by the claimant.

[60] We, therefore, find that the Industrial Court did not commit any error of law of the type as envisaged by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 and as such, the High Court erred in granting judicial review to quash the award and in remitting the case to the Industrial Court for adjudication.

Outcome

[61] For the reasons as stated above, the Institute's appeal is allowed. The order of the High Court dated 7 March 2023 is set aside. The award of the Industrial Court is reinstated and the case is struck out. We order costs of RM10,000 (subject to allocatur) as costs here and below.